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Nos. 463, 529, 519, and 565

In the Supreme Court of the United States

OCTOBER TERM, 1930

DANIEL REEVES, INC., PETITIONER

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

LAURA H. JENNINGS, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FREDERIC B. JENNINGS, DECEASED, PETITIONER

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

EASTERN EQUITIES CORPORATION, FORMERLY BEARING THE CORPORATE NAME AMERICAN GLUE COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

WRIGHT & TAYLOR, INC., PETITIONER

v.

ROBERT H. LUCAS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF KENTUCKY

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

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No. 463

DANIEL REEVES, INC., PETITIONER

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

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LAURA H. JENNINGS, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FREDERIC B. JENNINGS, DECEASED, PETITIONER

v.

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No. 519

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v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 565

WRIGHT & TAYLOR, INC., PETITIONER

v.

ROBERT H. LUCAS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF KENTUCKY

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Circuit Court of Appeals in *Reeves* v. *Anderson* (R. 34) is not yet reported; the opinion of the District Court (R. 19) is reported *sub nom. Regla Coal Co.* v. *Bowers* in 37 F. (2d) 373.

The opinion of the Circuit Court of Appeals in *Jennings* v. *Anderson* (R. 28) is not yet reported. The District Court rendered no opinion.

The Circuit Court of Appeals rendered no opinion in *Eastern Equities Corp.* v. *United States*; the opinion of the District Court (R. 25) is not yet reported.

The opinion of the Circuit Court of Appeals in *Wright & Taylor, Inc.*, v. *Lucas* (R. 44) is not yet reported; the opinion of the District Court (R. 25) is reported in 34 F. (2d) 328.

JURISDICTION

Reeves v. *Anderson*, No. 463

The judgment of the Circuit Court of Appeals was rendered July 28, 1930. (R. 40.) The petition for certiorari was filed September 18, 1930. Certiorari was granted October 20, 1930. (R. 41.)

Jennings v. *Anderson*, No. 529

The judgment of the Circuit Court of Appeals was rendered July 28, 1930. (R. 28.) The petition for certiorari was filed October 27, 1930. (R. 36.) Certiorari was granted November 24, 1930. (R. 35.)

The judgment of the District Court. (R. 12) was rendered September 8, 1930. Appeal to the Circuit Court of Appeals for the First Circuit was allowed (R. 33) on September 15, 1930. The petition for certiorari was filed October 21, 1930, prior to the hearing and submission in the Circuit Court of Appeals. Certiorari was granted November 24, 1930. (R. 41.)

Wright & Taylor, Inc., v. *Lucas*, No. 565[1]

The judgment of the Circuit Court of Appeals was rendered November 10, 1930. (R. 44.) The petition for certiorari was filed November 28, 1930. Certiorari was granted December 8, 1930.

The jurisdiction of this Court in all of the cases is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The general question presented in all of the cases is: Where a tax is assessed within time and prior to June 2, 1924 (the effective date of the Revenue Act of 1924), but a claim in abatement is filed and collection is deferred until after the statutory period therefor has expired, does Section 611 of the Revenue Act of 1928 bar recovery of the tax so paid.

[1] The record references in this case are to the record filed with the petition for certiorari.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra*, pp. 14–15.

STATEMENT

In *Reeves* v. *Anderson*, No. 463, the petitioner filed its tax return for the year 1919 on March 11, 1920. (R. 12.) In March, 1924, the Commissioner of Internal Revenue assessed an additional tax. (R. 14.) On April 16, 1924, a claim in abatement of this additional tax was filed. (R. 14.) The five-year period for the collection of the additional tax expired on March 11, 1925. On September 28, 1925, the claim in abatement of the additional taxes was rejected. (R. 14.) On November 14, 1925, the additional tax was collected. (R. 13.) On April 27, 1927, the petitioner filed a claim for refund of the additional tax. (R. 13.) On November 5, 1927, this claim for refund was rejected (R. 14), and on November 22, 1927, this suit was commenced (R. 1).

In the other cases the material facts are as follows:

Jennings v. *Anderson*, No. 529

March 15, 1919—income and profits tax return for year 1918 filed. (R. 18.)

February 8, 1924—additional tax for 1918 assessed. (R. 18.)

February 25, 1924—claim for abatement of additional tax filed. (R. 19.)

March 15, 1924—five-year period for collection of additional 1918 tax expired.

August 14, 1924—claim for abatement of additional 1918 tax rejected. (R. 19.)

July 30, 1925—additional 1918 tax paid. (R. 19.)

September 19, 1925—claim for refund of additional 1918 tax filed. (R. 19.)

May 13, 1926—claim for refund rejected. (R. 19.)

December 6, 1927—suit commenced. (R. 1.)

May 29, 1928—Revenue Act of 1928 became law.

Eastern Equities Corp v. *United States*, No. 519

May 1, 1918—income and profits tax return for the year 1917 filed. (R. 5.)

September, 1920—additional income and profits tax for 1917 assessed. (R. 6.)

November 15, 1920—claim for abatement of part of additional tax filed. (R. 6.)

November 16, 1920—additional tax paid in part. (R. 6.)

May 1, 1923—five-year period for collection of additional tax expired.

August 18, 1924—claim for abatement of unpaid additional tax rejected. (R. 6.)

November 24, 1925—unpaid additional tax plus interest collected under warrant of distraint. (R. 7.)

December 31, 1925—claim for refund of additional tax plus interest filed. (R. 7.)

October 16, 1926—claim for refund rejected. (R. 7.)

May 29, 1928—Revenue Act of 1928 became law.

January 15, 1929—suit commenced. (R. 1.)

Wright & Taylor, Inc., v. *Lucas*, No. 565

June 17, 1919—income and profits-tax return for 1918 filed. (R. 22.)

August, 1919—assessment of additional tax for the year 1918. (R. 23.)

September 12, 1919—assessment of the tax shown on the return for 1918. (R. 23.)

September 15, 1919—claim for abatement of additional 1918 tax filed. (R. 23.)

December 13, 1923—waiver filed extending time for assessment. (R. 24.)

June 17, 1924—original five-year period for assessment and collection expired.

December 13, 1924—period for assessment and collection as extended by waiver expired.

September 8, 1925—additional 1918 tax plus interest collected. (R. 24.)

September 30, 1925—claim for refund filed. (R. 24.)

April 14, 1927—suit commenced. (R. 1.)

May 29, 1928—Revenue Act of 1928 became law.

ARGUMENT

It is the respondents' position that the facts of these cases bring them clearly within the terms of Section 611 of the Revenue Act of 1928 and that that section is a complete and effective defense to the suits herein. Section 611 provides in substance

that if a tax was within the period of limitation properly applicable thereto assessed prior to June 2, 1924, and if a claim in abatement was filed with or without bond and if the collection of any part thereof was stayed then the payment of such part (made before or within one year after the enactment of the Act) should not be considered as an overpayment under the provisions of Section 607 of the Act relating to payments made after the expiration of the period of limitation on assessment and collection.

In each of the instant cases the tax was assessed in time and before June 2, 1924. Claims for abatement were filed and the collections were delayed until after the claims were decided. The collections were made after the running of the statutory period of limitation therefor and before the enactment of the Revenue Act of 1926. The pertinent dates in each case are set forth in the statement. With regard to the application of Section 611 the material facts in each of the instant cases are the same as those in *Graham and Foster* v. *Goodcell*, now before this Court, No. 36, present term. In that case it is contended for the collector as respondent that Section 611 prevents recovery of any amount which had been assessed within time and prior to June 2, 1924, where a claim in abatement had been filed and collection stayed. The argument for the collector in the *Graham and Foster case* is equally applicable to the position of the respondent in each of the instant cases.

In *Daniel Reeves, Inc.*, v. *Anderson, Collector*, No. 463, and *Laura H. Jennings, Executrix*, v. *Anderson, Collector*, No. 529, it will be noted that the claim in abatement in each case was not rejected until after the applicable period of limitations had expired. Accordingly, the contention made by the petitioner in the *Graham and Foster case* that collection of the tax was not stayed by the claim in abatement for the additional reason that there remained a period of time after the rejection of the claim within which the collector might have collected is not available to the petitioners in these cases.

In *Wright & Taylor, Inc.*, v. *Lucas, Collector*, No. 565, the record does not show any rejection of the claim in abatement. In that case, the contention, made in all the cases, that collection was not stayed by the claim in abatement, is based upon the additional fact that the taxpayer filed a waiver of a period of limitation for assessment. It will be noted from the statement of facts that the waiver was filed more than four years after the making of the claim in abatement. The waiver period, which ran for less than six months after the expiration of the original five-year period, terminated while the claim in abatement was still pending, the collection meanwhile being stayed. From this it seems evident that the waiver had no effect on the stay of collection, which was attributable solely to the fil-

ing and consideration of the claim in abatement. The circumstance of the waiver has, therefore, no bearing upon the question presented in this case and in all the related cases.

In *Eastern Equities Corporation* v. *United States*, No. 519, as in *Daniel Reeves, Inc.*, v. *Anderson, Collector*, and *Laura H. Jennings* v. *Anderson, Collector*, the claim in abatement was not rejected until after the period for collection had run. Suit for recovery was instituted by the taxpayer after the enactment of the Revenue Act of 1928. The petitioner in the *Eastern Equities Corporation case* raises two points which have not been argued in the *Graham and Foster case*. It is our view that neither of these points presents such a material distinction as to require a different result from that which will be reached in the *Graham and Foster case*.

The first point is that, since the additional tax and interest was collected by actual distraint and seizure of the petitioner's money on deposit in a bank, such collection is not embraced within the terms of Section 611. We submit that it was the legislative intent in enacting Section 611 to retain all amounts collected, whether by voluntary payment or otherwise, where the collection was delayed by reason of the filing of a claim in abatement. It appears from the House Ways and Means Committee Report on Section 611 (set forth

in Appendix B, pp. 48–49 of the respondent's brief in the *Graham and Foster case*) that the section was enacted as a result of the decision of this Court which established the fact that collections made by distraint more than five years after the return were illegal, although prior to that decision it was supposed by the Treasury Department that there was no limitation on collection by distraint. The case referred to was *Bowers* v. *New York & Albany Co.*, 273 U. S. 346, which involved a collection by actual distraint. Since the *New York & Albany case* gave rise to Section 611 it seems apparent that in enacting the section Congress must have intended to embrace therein collections such as the one made in that case. Moreover if, as we contend, it was the legislative intent to retain in the Treasury amounts the collection of which had been delayed by a claim in abatement, there would seem to be no justification for permitting those who allowed the warrant of distraint to be executed to recover the amounts so collected and prohibiting recovery by those who paid either voluntarily or to avoid distraint.

We submit that Section 611 was intended to prevent recovery of all amounts collected after the statute of limitation had run when such collection was delayed by a claim in abatement and that the word "payment" is broad enough to cover a

satisfaction of the tax liability either by act of the taxpayer or distraint by the collector.

The second point raised by the petitioner and not argued in the *Graham and Foster case* relates to interest in the amount of $62,040.08 which was collected together with the tax after the statute of limitation had run. The petitioner contends that since the interest was not assessed prior to June 2, 1924, it is not embraced within the terms of Section 611. But interest in this case was collectible without assessment. Interest may be collected on Federal taxes even where there is no statutory provisions therefor. Cf. *Billings* v. *United States,* 232 U. S. 261. Here there is express statutory authority for the collection of interest upon the tax, where a claim in abatement was filed, from the time the tax was due until the claim is decided. Cf. Revenue Act of 1921, c. 136, 42 Stat. 227, 266, 267, Section 250 (e) (h). There is no requirement that the interest, as such, should be assessed. The rate of interest and the time for which it ran were fixed by the statute. It was collectible as a part of the tax without further action by the Commissioner. The amount of interest which is payable being dependent upon the correct amount of the tax and upon the duration of the consideration of the claim in abatement, it would be impossible as a practical matter to assess it prior to final action upon the claim. Accordingly, if Sec-

tion 611 were to be interpreted as contended by the petitioner to require the assessment of the interest as well as the tax it would require a practical impossibility and would impose a condition upon the collection of the interest which was not contemplated by the terms of the statute providing for its payment.

The interest so collected represents compensation to the Government for the delay in payment of the tax—for the forbearance to collect the tax when it is due. *Billings* v. *United States, supra; United States* v. *Childs,* 266 U. S. 304, 309–310. Since this delay was caused by the reconsideration of the assessment as a result of the taxpayer's claim in abatement, it is entirely proper that the amount of the compensation which the law authorizes for the delay should be retained as well as the tax itself. We submit that the retention of the tax assessed prior to June 2, 1924, authorized by Section 611 carries with it the right to retain the interest imposed by law which could not be assessed as a practical matter and which was collectible without assessment.

The petitioners in the instant cases have been supplied with copies of the Government's brief in the *Graham and Foster case.* To avoid repetition of the entire argument contained therein, we respectfully refer the Court to the brief filed for the Government in that case.

CONCLUSION

It is respectfully submitted that the judgments of the lower courts in the instant cases should be affirmed.

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DECEMBER, 1930.

APPENDIX

Section 250 (e) (h) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 266, 267, provides:

> (e) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of five per centum on the amount due but unpaid, plus interest at the rate of one per centum per month upon such amount from the time it became due: *Provided,* That as to any such amount which is the subject of a bona fide claim for abatement filed within ten days after notice and demand by the collector, where the taxpayer has not had the benefit of the provisions of subdivision (d), such sum of five per centum shall not be added, and the interest from the time the amount was due until the claim is decided shall be at the rate of one-half of one per centum per month on that part of the claim rejected.
>
> * * * * *
>
> (h) The provisions of subdivisions (e), (f), and (g) of this section shall apply to the assessment and collection of taxes which have accrued or may accrue under the Revenue Act of 1917, the Revenue Act of 1918, or this Act.

The Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875 (U. S. C. Sup. III, Title 26, Secs. 2607, 2611, 2612) provides in part as follows:

SEC. 607 EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

* * * * *

SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT.

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

SEC. 612. REPEAL OF SECTION 1106(a) OF 1926 ACT.

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

U. S. GOVERNMENT PRINTING OFFICE: 1936